(4)

No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH*
Solicitor

ANN M. BOEHM
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424-0001
(202) 482-6620

**Counsel of Record*

5788

QUESTIONS PRESENTED

1. Whether an Office of the Inspector General investigator is properly considered a "representative of the agency" for purposes of the representation rights set forth in 5 U.S.C. 7114(a)(2)(B).

2. Whether the agency headquarters, in this case the National Aeronautics and Space Administration, is responsible for an unfair labor practice committed by the agency's Office of the Inspector General as a result of its non-compliance with 5 U.S.C. 7114(a)(2)(B).

TABLE OF CONTENTS

Argument—Continued

Argument—Continued

TABLE OF AUTHORITIES

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-369

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 120 F.3d 1208.[2] The decision and order of

[1] "Pet. App." refers to the Appendix in the petition for a writ of certiorari filed in this case.

[2] The court's denial of the Agency's petition for rehearing and suggestion of rehearing *en banc* is also appended to the petition. Pet. App. 75a-76a.

the Federal Labor Relations Authority (Pet. App. 21a-57a) is reported at 50 FLRA 601.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. Pet. App. 1a. A petition for rehearing was denied on March 31, 1998. *Id.* at 76a. On June 22, 1998, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 29, 1998, and on July 24, 1998, further extended the time for filing to August 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996), and the Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12 (1994 & Supp. II 1996) are reproduced in the appendix to petitioners' brief. Pet. Br. App. 1a-93a.

STATEMENT

A. Background - The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute (Statute) governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Federal Labor Relations Authority (Authority) include adjudicating unfair labor practice (ULP) complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93. Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Id.* at 97.

The Statute makes it a ULP for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1) and (8). The instant case involves a ULP under section 7116(a)(1) and (8) and concerns the Authority's interpretation of the representational right set forth in section 7114(a)(2)(B) of the Statute.

Section 7114(a)(2)(B) provides that an exclusive representative "shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2)(B). This statutory provision extends to federal employees the right to union representation

provided in the private sector by the NLRB through its interpretation of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (1994 & Supp. II 1996) (NLRA), and the Supreme Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*). *See* 124 Cong. Rec. 29,184 (1978), *reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 926 (1979) (*Legis. Hist.*) (Congressman Udall explained that the House bill provisions that led to the enactment of section 7114(a)(2)(B) were intended to reflect the Supreme Court's decision in *Weingarten*); *Internal Revenue Serv., Wash., D.C.* v. *FLRA*, 671 F.2d 560, 563 (D.C. Cir. 1982) (same).

Although representational rights under section 7114(a)(2)(B) and *Weingarten* were intended to be similar, Congress also recognized that the right to representation might evolve differently in the private and federal sectors, and that NLRB decisions would not necessarily be controlling in the federal sector. *See Legis. Hist.* at 824; *U.S. Immigration & Naturalization Serv., N.Y. Dist. Office, N.Y., N.Y.*, 46 FLRA 1210, 1218 (1993) (*INS, N.Y Dist.*), *review denied sub nom. American Fed'n of Gov't Employees* v. *FLRA*, 22 F.3d 1184 (D.C. Cir. 1994). Moreover, in the federal sector the *Weingarten* representation right is expressly codified in the Statute, whereas the same right in the private sector inheres in the employee's guaranteed right to act in concert for mutual aid and protection. *See Weingarten*, 420 U.S. at 256, 260.

In interpreting the statutory representation right set forth in section 7114(a)(2)(B), the Authority has determined that it considers an Office of the Inspector

General (OIG) agent to be a "representative of the agency." Pet. App. 37a, 40a. As such, when a bargaining unit employee properly seeks and is denied union representation in an OIG investigation, section 7114(a)(2)(B) is violated and a ULP has occurred. *See id.* at 48a.

B. The Instant Case

1. Factual Background

This ULP case came before the Authority due to events that occurred at the George C. Marshall Space Flight Center (MSFC), a component of the National Aeronautics and Space Administration, Headquarters (NASA-HQ), located in Huntsville, Alabama. Pet. App. 23a. NASA-HQ is headquartered in Washington, D.C. *Id.* The National Aeronautics and Space Administration, Office of the Inspector General (NASA-OIG), also headquartered in Washington, D.C., has NASA-OIG offices located at MSFC as well as at other NASA-HQ components. *Id.* The NASA-OIG investigators assigned to MSFC are subject to the direction of individuals in the NASA-OIG chain of command and are not under the supervision of any MSFC officials. *Id.* The NASA Inspector General reports to the Administrator of NASA-HQ—the head of the agency. *Id.*

In 1993, NASA-OIG received information from the Federal Bureau of Investigation (FBI) regarding possible illicit activities by an MSFC employee, P.[3] *Id.* P was linked to documents that allegedly posed threats to P's co-workers at MSFC. *Id.* NASA-OIG relayed this information to a NASA-OIG investigator at MSFC. *Id.*

---

[3] For confidentiality and other reasons, the employee involved has been referred to as "P." *Id.* n.11.

The NASA-OIG investigator proceeded to conduct an investigation and contacted P to arrange an interview.[4] *Id.* at 23a-24a. P requested that his attorney and a union representative be present during the examination, and the NASA-OIG investigator agreed. *Id.*

The examination took place at the office of P's attorney. *Id.* at 24a. Those present included the NASA-OIG investigator, another NASA-OIG investigator working out of MSFC, P's attorney, and a union representative. *Id.* The NASA-OIG investigator established ground rules for the conduct of the proceeding that provided, among other things, that the union representative was present as a "witness"; that as union representative, he would not be allowed to interrupt the examination; and that the union representative could, in the future, be called as a witness for the government. *Id.* The union representative twice objected to this limitation on his role as union representative and stated that he was attending the interview in order to represent the interests of the union, the bargaining unit, and P. *Id.* The NASA-OIG investigator responded by threatening to cancel the interview and move it elsewhere if the union representative did not "maintain himself" and, at several points during the interrogation, the NASA-OIG investigator challenged the union representative's representational actions. *Id.* at 24a-25a.

NASA-OIG furnished information regarding P to MSFC. *Id.* at 60a. P was thereafter removed from his employment at MSFC. *Id.* at 63a.

---

[4] Early in the investigation, the NASA-OIG investigator determined that P had not violated the law, and thus the investigation was administrative and not criminal. *Id.* at 23a- 24a n.12.

2. The Administrative Law Judge's Decision

The complaint in this case, based upon the charge filed by Local 3434 of the American Federation of Government Employees (AFGE)—the exclusive representative of bargaining unit employees at MSFC—alleged that NASA-HQ and NASA-OIG (collectively "petitioners" or the "Agency") violated section 7116(a)(1) and (8) of the Statute by failing to allow the union representative to participate in the examination of P, in contravention of section 7114(a)(2)(B) of the Statute. Pet. App. 22a. A hearing was held before an Administrative Law Judge (ALJ) on the complaint. Pet. App. 59a. The ALJ subsequently issued a decision finding that the NASA-OIG investigator's actions interfered with the union's right to take an active role during an examination of an employee and therefore violated section 7114(a)(2)(B). Pet. App. 25a, 64a, 70a-71a. In making this decision, the ALJ found that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B). *Id.* at 25a, 64a. The ALJ found that NASA-OIG committed a ULP under section 7116(a)(1) and (8) of the Statute. Pet. App. 26a, 71a. Finding insufficient record evidence to show that NASA-HQ was responsible for the violation, the ALJ recommended that the complaint against NASA-HQ be dismissed. *Id.*

3. The Authority's Decision

In its ULP decision and order, the Authority concluded that the NASA-OIG investigator's actions during the course of the investigation of a bargaining unit employee violated the Statute.[5] *Id.* at 48a. The

---

[5] Notwithstanding the fact that the NASA-OIG investigator allowed the union representative to be present during the investigation of the bargaining unit employee, the Authority

Authority also reaffirmed that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. *Id.* at 40a. Finally, the Authority found that both NASA-HQ and NASA-OIG were responsible for NASA-OIG's violation of the Statute. *Id.* at 48a-49a. Accordingly, the Authority issued an appropriate remedial order. *Id.* at 52a-53a.

a. The NASA-OIG Investigator Acted as a "Representative of the Agency"

The Authority based its finding that the NASA-OIG investigator was acting as a "representative of the agency," NASA-HQ, on three fundamental conclusions:

> (1) the term "representative of the agency" under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the [Inspector General] Act[6] are not irreconcilable.

Id. at 40a-41a. The Authority reached these conclusions only after extensively analyzing relevant case law.

In *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and*

---

concluded that restrictions on the union representative's role prevented his effective representation during the interrogation, and thus violated section 7114(a)(2)(B). *Id.* at 33a. In the court below, this finding was not contested by the Agency. *Id.* at 6a n.4. Accordingly, it will not be addressed further herein.

[6] The statutory scheme governing OIGs is set forth in the Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12 (1994 & Supp. II 1996) (IG Act).

Defense Contract Administration Services Region, New York, 28 FLRA 1145, 1149 (1987) (*DOD, DCIS*), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense* v. *FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*), the Authority had established that an OIG investigator is considered to be a "representative of the agency" within the meaning of section 7114(a)(2)(B). Pet. App. 37a. Although the Third Circuit affirmed this conclusion in *DCIS*, the D.C. Circuit rejected the Authority's interpretation of section 7114(a)(2)(B) as it pertained to an OIG representative in *United States Department of Justice* v. *FLRA*, 39 F.3d 361, 365 (D.C. Cir. 1994) (*DOJ*). Pet. App. 37a.[7]

In the instant case, the Authority carefully reviewed the factual background and findings in both *DCIS* and *DOJ*, to include both courts' analyses of the statutory language of section 7114(a)(2)(B) as well as the language and legislative history of the IG Act. Pet. App. 37a-40a. After its review of the two cases, the Authority reaffirmed its holding in *DOD, DCIS* and agreed with the Third Circuit's *DCIS* reasoning by concluding that the NASA-OIG investigator was acting as a

---

[7] The Fourth Circuit also decided a related case that arose in the context of a negotiability dispute. *United States Nuclear Regulatory Comm'n* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (2-1 decision) (*NRC*). The court reviewed and rejected the Authority's determination that an agency was obligated to bargain over four bargaining proposals implicating section 7114(a)(2)(B). *Id.* at 236. The court determined that the bargaining proposals, which defined employee rights and procedures for all investigatory interviews, including those conducted by the OIG, were non-negotiable because they interfered with the OIG's independence as granted by the IG Act. *Id.* at 235. Decided after *DCIS* and before *DOJ*, the *NRC* majority neither criticized nor viewed its decision as inconsistent with *DCIS*; instead, the Fourth Circuit majority viewed the Authority's negotiability determination as an expansion of "the limited holding of [*DCIS*]." *Id.*

"representative of the agency" under section 7114(a)(2)(B). Pet. App. 40a-41a.

The Authority first considered which management personnel are obligated to recognize the section 7114(a)(2)(B) representational right, and concluded, consistent with *DCIS*, that the statutory right is not "dependent upon the organizational entity within the agency to whom the person conducting the examination reports." *Id.* at 41a. As such, the Authority determined that the phrase "representative of the agency" should not be so narrowly construed as to exclude management personnel employed in different components or subcomponents of the agency, such as the OIG.[8] *Id.* at 41a-42a. "If such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG) to conduct investigative interviews of bargaining unit employees." *Id.* n.22.

Next, the Authority analyzed the statutory independence of OIGs, pursuant to the IG Act, and concluded that this independence does not necessarily exempt OIG investigatory examinations from the provisions of section 7114(a)(2)(B). *Id.* at 42a. Although recognizing the OIG's statutory independence, the Authority noted that the independence is not absolute—and becomes nonexistent when the OIG conducts an interview of an employee concerning work-related misconduct and, as in the instant case, reports the findings to the agency for possible disciplinary action. *Id.*

---

[8] The Authority observed that it is "clear and unchallenged that NASA is an 'agency' under 5 U.S.C. § 7103(a)(3)." *Id.* at 41a-42a.

The Authority then considered the statutory provisions and legislative histories of section 7114(a)(2)(B) and the IG Act and concluded that the two are not incompatible. *Id.* at 43a. First, the statutory language of the two provisions revealed no inconsistencies. *Id.* at 44a. Second, despite the recognized congressional intent that the OIG be independent from the agency, the Authority found that the purpose of this independence is to insulate the OIG from agency management pressure—not from compliance with federal labor relations requirements. *Id.* at 45a. Third, based upon the limited representational function of a union representative under section 7114(a)(2)(B), and the benefits to the investigatory process that may result from union presence, the Authority determined that compliance with section 7114(a)(2)(B) would not unduly restrain the conduct of OIG investigative interviews. *Id.* at 46a-47a.

Finally, the Authority noted that even if the two statutes conflicted, it found no congressional intent suggesting that either the Statute or the IG Act is preemptive of the other. *Id.* at 47a. Thus, the Authority concluded that the IG Act should not trump the Statute. *Id.* at 48a.

b. NASA-OIG Committed a ULP for which NASA-HQ Was Also Responsible

Because the conduct of the NASA-OIG investigator, as a "representative of the agency," interfered with the rights of employees in another component of the agency, the Authority decided that NASA-OIG violated the Statute. *Id.* The Authority concluded that NASA-OIG was properly held responsible for violating the Statute, notwithstanding the fact that NASA-OIG did not have a collective bargaining relationship with the bargaining

unit in this case. This holding comports with well-established precedent that the Authority will find a statutory violation when a component of an agency infringes upon the protected rights of bargaining unit employees of another component of the same agency. *See Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 884 (1986) (*DLA*).[9] Pet. App. 48a.

The Authority disagreed, however, with the ALJ's recommendation to dismiss the complaint against NASA-HQ. *Id.* at 49a. In reviewing the record evidence, the Authority found that NASA-OIG, in its investigative role, represents the interests of NASA-HQ and other NASA-HQ subcomponents. *Id.* at 50a. NASA-OIG shares investigative information with NASA-HQ and NASA-HQ subcomponents, and such information is used as a basis for disciplinary action. *Id.* In addition, the NASA Inspector General reports to, and is under the supervision of, the Administrator of NASA-HQ. *Id.* (citing 5 U.S.C. App. 3 § 3(a)). Based upon these factors, and the Authority precedent applying the *DLA* rationale to the actions of the parent agency and a subcomponent, *see U.S. Dep't of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 1000-01 (1993) (*DVA*), the Authority found NASA-HQ responsible for a statutory violation based upon its failure to ensure that NASA-OIG comply with the Statute. Pet. App. 50a.[10]

---

[9] As the Authority explained, "[t]his concept has its genesis in the private sector." Pet. App. 48a n.26. Even a non-employer has been sanctioned for violating the rights of bargaining unit employees. *See Hudgens* v. *NLRB*, 424 U.S. 507, 510 n.3 (1976); *Austin Co.*, 101 NLRB 1257, 1258-59 (1952). Pet. App. 48a-49a n.26.

[10] The Authority recognized (Pet. App. 51a) that in finding the parent agency liable, it was deviating from its holding in the decision underlying the D.C. Circuit's *DOJ* decision, *U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Inspector General, Washington D.C. and Office of Professional Responsibility, Washington, D.C.*, 46 FLRA 1526, 1571 (1993) (*DOJ, Twin Cities*). Based upon its analysis in the instant case, however, the Authority concluded that holding NASA-HQ, as well as NASA-OIG, responsible for the ULP committed by NASA-OIG would effectuate the purposes of the Statute because it is appropriate for agency headquarters to advise OIG personnel of their responsibilities under the Statute. *Id.* at 50a-51a.

4. The Court of Appeals' Decision in the Instant Case

The Eleventh Circuit enforced the Authority's ULP decision and order and denied the Agency's petition for review. Pet. App. 20a. The court agreed with essentially every aspect of the Authority's decision.

Deferring to the Authority's interpretation of the Statute, the court found no error in the Authority's determination that an OIG investigator is a "representative of the agency" under section 7114(a)(2)(B). *Id.* at 9a. NASA-OIG had argued to the court that the rights and duties set forth in section 7114(a)(2)(B) derive from the collective bargaining relationship, of which NASA-OIG is not a part. *Id.* at 8a-9a. However, the Eleventh Circuit, like the Authority and the Third Circuit, rejected this argument. *Id.* at 9a-11a.

The court found that reading such a requirement into section 7114(a)(2)(B) "would undermine Congress's purpose in enacting this section." *Id.* at 10a. Noting that section 7114(a)(2)(B) "focuses on the risk of adverse employment action to the employee," the court concluded that "[b]ecause this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason

why the protection afforded by Congress should be eliminated in such situations." *Id.* Because the Authority had determined that NASA-OIG performs an investigatory role on behalf of NASA-HQ and its components, the court concluded that the NASA-OIG investigator was a "representative of the agency." *Id.* at 11a.

With regard to the Authority's interpretation of the IG Act, the court did not defer to the Authority, *id.* at 5a, but nevertheless agreed with the Authority's conclusions and its reasoning, *id.* at 12a-15a. The court found nothing in the text or legislative history of the IG Act "to justify exempting OIG investigators from compliance with the federal *Weingarten* provision." *Id.* at 12a.

In considering the congressional intent that OIGs be independent from the agencies they investigate, the court found that "the presence of a union representative at OIG interviews, as mandated by federal statute," is not the "type of interference from which Congress sought to insulate OIG investigators." *Id.* at 14a. The court explained that it did not foresee a union representative hindering an OIG agent's investigative process. *Id.* It thus concluded that compliance with section 7114(a)(2)(B) is not "sufficiently inconsistent with the IG Act to justify an implied exemption for OIG investigators." *Id.* at 15a. Without such a conflict, the court could not justify ruling that the IG Act "impliedly" repealed section 7114(a)(2)(B). *Id.* (citing *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (*Morton*)). Therefore, the court concluded that NASA-OIG committed a ULP because the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) and the investigator's conduct was in violation of the Statute. *Id.*

After finding that NASA-OIG violated the Statute, the court then agreed with the Authority's

determination that NASA-HQ, as parent agency for NASA-OIG, was also responsible for the section 7114(a)(2)(B) violation. *Id.* at 19a. The court acknowledged the Authority's holdings finding a parent agency responsible for a statutory violation by a subcomponent of the agency. *Id.* at 18a.

The court analyzed the Authority's finding that, because NASA-HQ "failed to ensure that NASA-OIG complied with § 7114(a)(2)(B)," it was guilty of a ULP. *Id.* Although the court recognized NASA-OIG's role as an "'independent and objective' unit" of NASA-HQ, pursuant to 5 U.S.C. App. 3 § 2, it also recognized that NASA-OIG "is subject to the general supervision of the agency head." *Id.* at 19a. Moreover, the court highlighted the fact that the NASA-OIG investigator "ordered the employee to answer questions or face dismissal," and this suggested that the NASA-OIG investigator was acting on behalf of NASA-HQ. *Id.* at 19a. The court therefore found no error in the Authority's determination. *Id.*[11]

---

[11] Subsequent to the Eleventh Circuit's decision in this case, the Second Circuit issued a decision in a factually analogous case. *FLRA* v. *U.S. Dep't of Justice, Washington, D.C., U.S. Dep't of Justice, Immigration and Naturalization Serv., New York Dist., N.Y. and Dep't of Justice, Office of the Inspector General, Washington, D.C.*, 137 F.3d 683 (2d Cir. 1998) (*DOJ, INS*), *petition for cert. filed*, 67 U.S.L.W. 3302 (Oct. 22, 1998) (No. 98-667). The Second Circuit agreed with the Authority, and the Third and Eleventh Circuits, that the "agency" within the meaning of section 7114(a)(2)(B) includes the agency headquarters. 137 F.3d at 689. With regard to whether an OIG investigator is a "representative of the agency," the court diverged from all prior court and Authority decisions. It concluded that an OIG investigator is a "representative of the agency" when conducting an interrogation "traditionally performed by agency supervisory staff," but not when questioning an employee for "bona fide purposes" under the IG Act. *Id.* at 686, 690.

SUMMARY OF ARGUMENT

I. The Authority correctly held that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. The Authority's determination on this point, which is consistent with the language and purpose of the Statute, is entitled to deference because it rests upon a reasonable interpretation of the Statute administered by the Authority.

Section 7114(a)(2)(B) codifies important representational rights for federal sector employees that correspond to the rights private sector employees enjoy under this Court's *Weingarten* decision. These rights are triggered during investigative interviews conducted by a "representative of the agency" when a bargaining unit employee reasonably fears disciplinary action.

It is undisputed in this case that a bargaining unit employee, who reasonably feared discipline, was denied effective union representation during an interrogation by a NASA-OIG investigator. It is also clear that based on information gathered by the OIG investigator, the employee was subsequently disciplined by his superiors at MSFC, a component of NASA-HQ. Further, there is no question that NASA-HQ is an "agency," as defined in the Statute. The inquiry here concerns only whether the NASA-OIG investigator should be considered a "representative of the agency" for the purposes of section 7114(a)(2)(B).

The Authority has determined that the phrase "representative of the agency" should not be so narrowly construed as to exclude management personnel, such as the OIG, who are located in other components of the agency. Nothing in the Statute's language contradicts the Authority's determination in this regard, and a conclusion to the contrary would

permit agencies to circumvent protected rights by utilizing personnel from other subcomponents of the agency to conduct investigative interviews of bargaining unit employees.

This logical interpretation of the Statute has been affirmed by the Third Circuit and the court below. These courts have noted that such an interpretation of the Statute is justified given the purposes of section 7114(a)(2)(B), its focus on the risk of discipline, and the fact that the results of such interrogations, as in this case, are routinely shared with the agency entity capable of disciplining the employee interviewed.

Petitioners assert that rights under section 7114(a)(2) apply only to the management entity that engages in collective bargaining with the union at issue and note in this regard that NASA-OIG and NASA-HQ have no direct collective bargaining relationship with the unit representing the employee in this case. Petitioners claim that the Authority has interpreted the phrase "representative of the agency" in a manner that is inconsistent with both the language and purposes of the Statute and in a manner inconsistent with the way in which the *Weingarten* case has been interpreted in the private sector. Both of these assertions are incorrect.

The language of the Statute, the policies behind section 7114(a)(2)(B), and pertinent case law directly contradict petitioners' argument that section 7114(a)(2)(B) rights apply only to the management entity that engages in collective bargaining with the union at issue. The express language of section 7114(a)(2)(B) in no way restricts the phrase "representative of the agency" to those acting directly for the management entity engaged in the collective bargaining relationship with the union. To the contrary, and as the Third Circuit noted, section 7114(a)(2)'s

express reference to the terms "bargaining unit" and "agency" support the Authority's broader interpretation of the Statute. Further, the policy reasons supporting the protection of bargaining unit employees' section 7114(a)(2) rights are directly implicated regardless of whether the agency official involved is assigned to the management entity having a collective bargaining relationship with the unit. Finally, neither the Authority's case law, nor judicial precedent interpreting the same, requires the existence of a collective bargaining relationship between the agency official and the bargaining unit employee as a necessary element for compliance with the requirements of the Statute.

Nor has the *Weingarten* decision been interpreted as being restricted to the collective bargaining relationship. Significantly, both the National Labor Relations Board and the United States Court of Appeals for the District of Columbia have concluded that the *Weingarten* right is properly applied in investigations by United States Postal Service Postal Inspectors, who serve under the auspices of the IG Act, when conducting investigations of alleged criminal activity by bargaining unit employees. *Weingarten*'s progeny establish that the core of the *Weingarten* right is the concern about the risk to the employee of disciplinary action because of the employee's participation in the interview. The Authority's case-specific determinations of the section 7114(a)(2)(B) right are consistent with *Weingarten*.

Petitioners assert that the representational requirements of section 7114(a)(2)(B), as interpreted by the Authority, conflict with the independence granted the OIG by the IG Act. However, as the Authority, the Third Circuit, and the court below have noted, nothing in the IG Act justifies exempting OIG investigators from

the requirements of section 7114(a)(2)(B). Rather, the legislative history of the IG Act reveals that the purpose of the OIG's independence is to insulate the OIG from agency management pressure, not to insulate the OIG from compliance with the federal labor relations laws.

Petitioners fail to point to any specific provision of the IG Act in conflict with the requirement of affording *Weingarten* protection to bargaining unit employees when interviewed by OIGs. Indeed, petitioners acknowledge that employees are entitled to attorney representation during OIG interviews. Given this Court's *Morton* v. *Mancari* principle that the proper course is to give effect to both laws while preserving each law's sense and purpose, the Authority's reconciliation of the two statutes is correct.

II. The Authority's determination that NASA-HQ is responsible, along with NASA-OIG, for the violation of the representation rights involved here is consistent with its finding that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B). NASA-OIG ultimately answers to and is under the general supervision of NASA-HQ, which failed to ensure that its OIG complied with the Statute's requirements. Holding NASA-HQ responsible for the actions of NASA-OIG in these circumstances effectuates the purpose of the Statute and comports with Authority precedent.

ARGUMENT

I. An Office of the Inspector General Investigator Is Properly Considered a "Representative of the Agency" Within the Meaning of 5 U.S.C. 7114(a)(2)(B)

A. The Authority's Interpretation of the Statute Is Consistent with the Language and Purpose of the Statute and Is Entitled to Deference

At issue in this case is the proper interpretation and application of section 7114(a)(2)(B) of the Statute. The statutory language of section 7114(a)(2)(B) provides specific representational rights to bargaining unit employees and their exclusive representatives: "[a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2)(B).

Although the phrase "representative of the agency" is not specifically defined in the Statute, one of its key words—"agency"—is broadly defined as "an Executive agency." 5 U.S.C. 7103(a)(3). It is undisputed, as it was before the Authority, that NASA-HQ "is an 'agency' under 5 U.S.C. 7103(a)(3)." Pet. App. 42a.[12] Given this

[12] This finding was affirmed by the court below, and also is supported by the decisions of the Second and Third Circuits. *See* Pet. App. 9a; *DOJ, INS*, 137 F.3d at 689; *DCIS*, 855 F.2d at 98. In addition, in *DOJ*, the D.C. Circuit found that the parent agency, the Department of Justice (DOJ), is an agency within the meaning of 5 U.S.C. 7103(a)(3), but because the Authority had dismissed DOJ from the case, the D.C. Circuit focused on whether the OIG could be the "agency" under both sections 7103(a)(3) and 7114(a)(2)(B). *See* 39 F.3d at 365-66.

controlling and expansive definition of "agency," the only remaining appropriate inquiry, therefore, is who is a "representative" of NASA-HQ in this case. The Authority's conclusion that the word "representative," or phrase "representative of the agency," includes management personnel in other subcomponents of the "agency" is entirely consistent with the language of the Statute. In this regard, nothing in the Statute suggests that an individual in the employ of either the agency's headquarters or of another component of an agency is entitled to ignore provisions in the Statute when dealing with bargaining unit employees. Additionally, this construction is consistent with the purpose and intent of Congress in enacting section 7114(a)(2)(B) of the Statute.

Congress intended through section 7114(a)(2)(B) for federal employees to enjoy the same rights available to private sector employees under *Weingarten* when they "are called upon to provide information that exposes them to the risk of disciplinary action." Pet. App. 41a; *see DCIS*, 855 F.2d at 99. When, as in this case, the interrogation is being conducted by an entity within the "agency" which shares information obtained as a result of the interrogation with the agency component for which the employee works, the risk of disciplinary action and attendant need for representation are evident. As expressed by the Third Circuit in *DCIS*, it is unlikely "that Congress intended that union representation be denied to the employee solely because the management representative is employed outside the bargaining unit." 855 F.2d at 99.

The Authority observed that a conclusion to the

contrary would allow agencies to circumvent bargaining unit rights and evade section 7114(a)(2)(B) responsibilities by utilizing personnel from other subcomponents to conduct investigative interviews of bargaining unit employees. *Id.* Indeed, the facts of this case support the reality of such circumvention of the section 7114(a)(2)(B) responsibilities, because the record shows that NASA-OIG investigators regularly provided the information obtained through investigations to NASA-HQ and MSFC for disciplinary action. Pet. App. 50a.

Thus the Authority, exercising its discretion and expertise to interpret its own organic statute, *see* 5 U.S.C. 7105(a)(2)(I), *BATF*, 464 U.S. at 92-93, properly determined that "representative of the agency" in section 7114(a)(2)(B) "should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency." Pet. App. 40a-41a. Where, as here, the Authority is directed to interpret the Statute that it is charged with implementing, its conclusions are reviewed under the standard set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). *See Fort Stewart Schs.* v. *FLRA*, 495 U.S. 641, 644-45 (1990) (*Fort Stewart*); *see also* 5 U.S.C. 7105. Under *Chevron*, if the relevant statutory language is clear, the Court "must give effect to the unambiguously expressed intent of Congress." *Fort Stewart*, 495 U.S. at 645 (citing *Chevron*, 467 U.S. at 842-43). If, on the other hand, the relevant statutory provisions are "silent or ambiguous" on the point at issue, the Court should affirm the Authority's conclusions if they are based on a "permissible construction of the [S]tatute." *Id.* As intended, the Authority "exercise[d] its 'special function of applying the general provisions of the [Statute] to the

complexities' of federal labor relations." *BATF*, 464 U.S. at 97 (citation omitted).

B. Petitioners' Focus on the Collective Bargaining Relationship Has No Foundation in the Statute or in Case Law and Is Inconsistent With the Intent of the Statute

As argued unsuccessfully to the Authority, as well as to the Second, Third, and Eleventh Circuits,[13] petitioners assert that the phrase "representative of the agency" in section 7114(a)(2)(B) refers only to those in the employ of the "management entity that has a collective bargaining relationship with a union." Pet. Br. 18. Under petitioners' interpretation of the phrase, no agency official outside of the agency entity at the level of exclusive recognition, including management personnel from an agency headquarters or in any other agency component, is a "representative of the agency." In support of their collective bargaining relationship claim, petitioners make two assertions, both of which are false: first, the collective bargaining relationship is a determinative factor in all section 7114 rights and in the definition of collective bargaining (5 U.S.C. 7103(a)(12)); and second, limiting the section 7114(a)(2)(B) right to disciplinary interviews conducted by the management entity that has a collective bargaining relationship is consistent with the *Weingarten* case and the manner in which the *Weingarten* right has evolved in the private sector. Neither of these arguments finds support in the Statute or established precedent. Furthermore, limiting the term "representative of the agency" to only those individuals assigned to the entity having a collective bargaining relationship with the union—MSFC in this

[13] *See* Pet. App. 42a; *DOJ, INS*, 137 F.3d at 690; *DCIS*, 855 F.2d at 99; Pet. App. 9a.

case—not only undermines the purpose of the Statute, but would also permit agencies to elude statutory responsibilities.

1. Neither the Statute nor Case Law Restricts Statutory Rights Based upon the Collective Bargaining Relationship in the Manner Suggested by Petitioners

Contrary to petitioners' claim, the existence of a collective bargaining relationship is not a prerequisite for the invocation of protected rights under section 7114(a)(2) of the Statute. Put differently, the absence of a collective bargaining relationship covering an agency official and a bargaining unit employee is not a defense to what would otherwise be a violation of section 7114(a)(2) of the Statute. The statutory provisions referenced by petitioners that include, in effect, the phrase "representative of the agency"—sections 7114(a)(2)(A),[14] 7114(a)(2)(B), and section 7103(a)(12)—contain no language restricting established, protected rights to the collective bargaining relationship. Moreover, neither the Authority nor reviewing courts have so narrowly interpreted these statutory provisions. Indeed, if such were the case, meaningful protected

[14] Section 7114(a)(2)(A) provides that a union is entitled to representation at any formal discussion or meeting "between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." In determining whether such a meeting is a formal discussion, the Authority considers numerous factors, including whether the individual who held the meeting is a "first-level supervisor or is higher in the management hierarchy" and "whether any other management representative attended." *See Marine Corps Logistics Base, Barstow, Cal.*, 45 FLRA 1332, 1335 (1992).

rights could be easily avoided and enforced only in an arbitrary manner.

To begin, the language of section 7114(a)(2) does not support petitioners' assertion. As the *DCIS* court noted, section 7114(a)(2) "makes express reference to the bargaining unit and appears to distinguish [the bargaining unit] from the 'agency.'" 855 F.2d at 99. The Third Circuit explained that in reference to "formal discussions" in section 7114(a)(2)(A) and "examination" in section 7114(a)(2)(B), the Statute refers to the "union as the 'exclusive representative of an appropriate unit' and to the employee as the 'employee in the unit.'" *Id.* In contrast, the Statute characterizes "management's representative as a 'representative of the agency.'" *Id.* Accordingly, and contrary to petitioners' argument, it is entirely consistent with the wording of the Statute to conclude that an employee in a bargaining unit is entitled to the rights enunciated in section 7114(a)(2) so long as the person conducting the formal discussion or interview is a "representative of the agency"—irrespective of where the conducting official and the bargaining unit employee are employed within the agency's organization.

Review of the Authority's case law interpreting section 7114(a)(2) rights demonstrates that the existence of a collective bargaining relationship is unnecessary to effectuate the rights outlined therein. *See Department of Veterans Affairs, Veterans Affairs Med. Ctr., Jackson, Miss.*, 48 FLRA 787, 793 (1993) (*VAMC, Miss.*) ("the rights contained in section 7114(a)(2)(B) are not tied to collective bargaining"), *reconsideration granted and rev'd on other grounds*, 49 FLRA 171 (1994). Furthermore, although not at issue in this case, other rights established in section 7114 are not dependent upon the collective bargaining relationship. *See U.S. Dep't of Veterans Affairs,*

Washington, D.C., Veterans Admin. Med. Ctr., Amarillo, Tex., 42 FLRA 333, 341, 342 (1991) (although VA employees have no rights under the Statute to engage in collective bargaining, they are fully protected in the exercise, through their exclusive representative, of other rights under the Statute, including the right to representation under section 7114(a)(2)(A)), *enforcement denied on other grounds, U.S. Dep't of Veterans Affairs, Washington, D.C., Veterans Admin. Med. Ctr., Amarillo, Tex.* v. *FLRA*, 1 F.3d 19 (D.C. Cir. 1993).

In fact, the Authority has squarely rejected the collective bargaining theory espoused by petitioners. For example, the Authority has found a violation of section 7114 when a higher echelon agency official improperly bypassed an exclusive representative and communicated directly with a bargaining unit employee concerning a grievance. *Department of Health & Human Servs., Social Sec. Admin., Baltimore, Md. and Social Sec. Admin., Region X, Seattle, Wash.*, 39 FLRA 298, 311-12 (1991) ((1) rejecting agency's contention that because the Regional Personnel Officer was part of an entity that "d[id] not have a bargaining relationship with the Union at the regional level," he therefore was not required to comply with the Statute and (2) finding the agency responsible for the Regional Personnel Officer's acts notwithstanding the Officer's organizational location). This rejection is in accord with the Authority's case law providing that "when higher-level management directs or requires management at a subordinate level to act in a manner that is inconsistent with the subordinate level's bargaining obligations under the Statute, the higher level entity violates" the Statute. *Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 46 FLRA 1184, 1186 (1993).

With regard to section 7114(a)(2)(A), the formal discussion provision, the collective bargaining relationship is immaterial to the Authority's determination of who is a "representative of the agency." *See Veterans Admin. Med. Ctr., Long Beach, Cal.*, 41 FLRA 1370, 1389-90 (1991) (interview of local, bargaining unit employee by attorney in agency's Office of District Counsel is a formal discussion under the Statute), *aff'd sub nom. Department of Veterans Affairs Med. Ctr.* v. *FLRA*, 16 F.3d 1526 (9th Cir. 1994). Even an outside private contractor has been held to be a "representative of the agency" for purposes of section 7114(a)(2)(A). *Defense Logistics Agency, Defense Depot Tracy, Tracy, Cal.*, 39 FLRA 999, 1001, 1013 (1991).

Nor is the "representative of an agency" referred to in section 7103(a)(12)'s definition of collective bargaining restricted to the management entity in the collective bargaining relationship with the union. Rather, the "representative" of that entity for bargaining purposes depends on whom the entity designates as its representative. It is axiomatic that an agency entity has the discretion to designate anyone it chooses to serve as its bargaining representative. *See American Fed'n of Gov't Employees and U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 4 FLRA 272, 274 (1980).

Finally, if the existence of a collective bargaining relationship between the agency official and the bargaining unit employee involved were the *sine qua non* petitioners claim it to be, section 7114 rights could be easily avoided through the simple stratagem of using an agency official from higher headquarters or another agency component to conduct formal discussions or interrogations. Rather than inquiring into the circumstances surrounding a formal discussion with or an interrogation of a bargaining unit employee, the

Authority would be obliged to examine an agency's organizational hierarchy to determine whether the agency official involved was under the direct authority of the management entity having a collective bargaining relationship with the bargaining unit. Such a rule would improperly premise violations of protected rights on the organizational entity to which the agency official was assigned—a result not remotely suggested in the Statute nor in any precedent interpreting it. As the Third Circuit noted, "we would have some difficulty understanding an interpretation of the [S]tatute limiting 'agency' to the subdivision comprising the collective bargaining unit and excluding 'representatives' of management that are employed in higher echelons of an 'Executive department.'" *DCIS*, 855 F.2d at 99.

2. Neither the Weingarten Case Nor the Manner in Which It Has Evolved Restricts the Representation Right Based upon a Collective Bargaining Relationship

Petitioners assert that the Authority's interpretation of section 7114(a)(2)(B) is inconsistent with the *Weingarten* decision and the manner in which the representation right has evolved in the private sector. According to petitioners, the *Weingarten* right arose out of the need to balance the power between the parties to collective bargaining, and absent a collective bargaining relationship between NASA-OIG and the bargaining unit, the power imbalance does not arise. Pet. Br. 20. However, petitioners' arguments are not supported by *Weingarten* itself or relevant private sector case law.

What this Court actually said in *Weingarten* is that the *NLRA* itself is intended to eliminate the "'inequality of bargaining power between employees . . . and employers.'" 420 U.S. at 262 (citation omitted). In light

of this statutory intent, and based upon the section 7 rights of the NLRA, bargaining unit employees and their representatives are entitled to representation at disciplinary interviews. *Id.* The heart of the *Weingarten* right, and thus section 7114(a)(2)(B), as noted by the Authority and the Eleventh and Third Circuits, is the "risk of adverse employment action to the employee" (Pet. App. 10a) and the right to union representation in that situation. *See* Pet. App. 41a; *DCIS*, 855 F.2d at 99.

As their primary example of how the private sector limits the *Weingarten* right to the existence of a collective bargaining relationship, petitioners assert that "when an entity other than management, such as a law enforcement officer, interviews a bargaining unit employee who might subsequently face discipline as a result of information obtained in the interview, the employee has no right to the presence of a union representative." Pet. Br. 21-22. Petitioners' argument is directly at odds with relevant holdings of the NLRB and the United States Court of Appeals for the District of Columbia.

The NLRB has long held that United States Postal Service (USPS) employees are entitled to *Weingarten* representation when interviewed by Postal Inspectors. *See United States Postal Serv. and Eddie L. Jenkins*, 241 NLRB 141 (1979) (*Jenkins*). Postal Inspectors, like OIG investigators, are employees of the parent agency, *see United States Postal Serv.* v. *NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992) (opinion by then-Judge Ginsburg) (*USPS*), but "are not under the supervision or direction of postal supervisors or managers," *United States Postal Serv. and Ralph Bell*, 288 NLRB 864 (1988).

In *Jenkins*, because the employees were administratively disciplined as a result of the Postal Inspector investigations, the NLRB concluded that not

allowing employees the *Weingarten* right in such situations would "in effect . . . nullify[] the *Weingarten* rights of any Postal Service employee who might be administratively disciplined as the result of a criminal investigation." *Jenkins*, 241 NLRB at 142. Finding the risk of disciplinary action to be the primary concern addressed by *Weingarten*, and not simply the elimination of inequality in bargaining power, the NLRB held that denying the *Weingarten* right in such situations would be "clearly repugnant to the historical development by the Board of the principle, approved by the Supreme Court in *Weingarten*, that Section 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." *Id.*

In sum, petitioners' arguments regarding the limitations on the breadth of the phrase "representative of the agency," which, of course, are not entitled to deference, find no support in either the Statute or applicable case law. The Authority's interpretation, which *is* entitled to deference, is consistent with both the language of the Statute as well as public and private sector case law. As the Third Circuit observed in *DCIS*, "[s]uch interpretation is exactly the sort of task that the [Authority] is meant to perform with respect to the [Statute] and has here accomplished." 855 F.2d at 100.

C. Interpreting the Phrase "Representative of the Agency" to Include OIG Investigators Does Not Conflict with the IG Act or OIG Investigative Functions

Before reaching its decision in the case *sub judice*, the Authority carefully analyzed both the statutory language and legislative history of the IG Act to ensure that the IG Act did not conflict with the obligations set

forth by Congress in section 7114(a)(2)(B). Pet. App. 41a-47a. Though recognizing the OIG's independence, the Authority pointed out that the OIG's autonomy is not absolute, particularly when OIGs conduct interviews that trigger employees' section 7114(a)(2)(B) rights. *Id.* at 42a. The Eleventh Circuit affirmed the Authority's determination that notwithstanding the NASA-OIG's statutory independence from NASA-HQ, the NASA-OIG investigator acted as a "representative of the agency" under section 7114(a)(2)(B). As the court recognized, "nothing in the text or legislative history of the IG Act . . . justif[ies] exempting OIG investigators from compliance with the federal *Weingarten* provision." Pet. App. 12a.

Consistent with the Authority and the Eleventh Circuit, the *DCIS* court explained that the term "'representative' should be construed with reference to the objective of the [S]tatute," not based upon the independence of the OIG. 855 F.2d at 100. OIG investigators are employees of the agency. *Id.* When an OIG investigator conducts an interview in order "to solicit information concerning possible misconduct of [agency] employees in connection with their work," and the information discovered may be provided to the supervisors in the affected subcomponent of the agency to be utilized for agency purposes, the OIG investigator is a "representative" of the agency. *Id.*

As shown below, petitioners' argument that the IG Act establishes that the OIG operates independently of the agency is overbroad and "unsupported by [its] text and legislative history." *Id.* at 98.

1. Review of the Statutory Language and Legislative History of the IG Act and the Language of Section 7114(a)(2)(B) Reveals that the Provisions Do Not Conflict

a. Statutory Language

Examination of the provisions of the IG Act reveals no conflict with the Statute, in general, or with section 7114(a)(2)(B), in particular. As recognized by the court below, "[n]o provision of the IG Act suggests that Congress intended to excuse OIG investigators from honoring otherwise applicable federal statutes," such as section 7114(a)(2)(B). Pet. App. 12a. Further, although the IG Act grants NASA-OIG a degree of independence from NASA-HQ, it also provides for NASA-OIG involvement in meeting agency objectives and in no way prohibits OIG cooperation with the agency.[15]

As detailed in the Authority's decision (Pet. App. 44a), under section 2(1) of the IG Act, the investigations and audits that NASA-OIG is authorized to conduct and supervise are focused entirely on NASA-HQ's programs and operations. 5 U.S.C. App. 3 § 2(1). Section 2(2) sets forth NASA-OIG's leadership role in promoting the "economy, efficiency, and effectiveness" of, and in

---

[15] Eleanor Hill, Vice-Chair of the organization of presidentially appointed Inspectors General, notes in the Inspector General community's journal that the Department of Defense Inspector General has, over the past 5 years, "participated in over 100 management process action teams, integrated process teams and working groups that have been the Department's principal means of generating new ideas for reforms and process improvement." Eleanor Hill, *A Message from the PCIE Vice-Chair*, The Journal of Public Integrity, Fall/Winter 1998, at 5. Such coordination undercuts petitioners' overbroad claim that the OIG is prohibited from involvement in "the policy and programmatic functions of agency management." Pet. Br. 31.

preventing fraud and abuse in, NASA-HQ's programs and operations. 5 U.S.C. App. 3 § 2(2). Section 2(3) expands this theme by enabling the Administrator of NASA-HQ, through NASA-OIG, to continue to be "fully and currently informed about [agency] problems and deficiencies . . . and the necessity for and progress of corrective action" by NASA-HQ. 5 U.S.C. App. 3 § 2(3). Rather than establish absolute autonomy, these statutory provisions reveal that NASA-OIG routinely represents and safeguards NASA-HQ's interests, as it does when it investigates the actions of Agency employees.

b. Legislative History

The goal of Congress in creating the OIGs was "'to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations' of certain specified federal agencies." Pet. App. 12a (quoting S.Rep. No. 95-1071 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676 (*IG Legis. History*)). To ensure accomplishment of this goal, "Congress believed it necessary to grant OIGs a significant degree of independence from the agencies they were charged with investigating." *Id.* That is, some amount of independence was "necessary to prevent agency managers from covering up wrongdoing within their agencies in order to protect their personal reputations and the reputations of their agencies." Pet. App. 13a; *see DCIS*, 855 F.2d at 98 (OIG independence intended to "insulate Inspector Generals from agency management which might attempt to cover up its own fraud, waste, ineffectiveness, or abuse."); Pet. App. 45a.

Although the OIG is an independent and objective unit, 5 U.S.C. App. 3 § 2, the OIG's independence from the agency is not unlimited. For example, despite being

given access to agency documents and personnel pursuant to 5 U.S.C. App. 3 § 6(a)(1) and (3), the OIG's access is limited to that necessary "to do an effective job, subject, of course, *to the provisions of other statutes*, such as the Privacy Act." *IG Legis. History* at 2709 (emphasis added). Also, the OIG's power to select and employ personnel necessary to conduct its business is "subject, of course, to the limits imposed by appropriations." *Id.* at 2710.

As both the Eleventh and Third Circuits have noted, the congressional intent to insulate OIGs from interference by agency management is not frustrated by an employee's exercise during an interview of the rights protected by section 7114(a)(2)(B). "We do not believe that the presence of a union representative at OIG interviews, as mandated by federal statute, creates the type of interference from which Congress sought to insulate OIG investigators." Pet. App. 14a; *see DCIS*, 855 F.2d at 98. Certainly the degree of intended independence is not so clearly set forth in either the statutory language or the legislative history so as to justify the creation of an "exemption" from section 7114(a)(2)(B) for OIG investigators. *See* Pet. App. 15a; *DCIS*, 855 F.2d at 100.

In summary, given the lack of any express statutory language in the IG Act or indication in the legislative history that compliance with section 7114(a)(2)(B) would improperly interfere with the OIG's intended independence, section 7114(a)(2)(B) and the IG Act should be interpreted in a manner that gives effect to both laws while preserving each law's sense and purpose. *See, e.g., Morton*, 417 U.S. at 551 ("it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective"). This is the course followed by

the court below, which recognized that "absent a discernible present conflict between the IG Act and [section] 7114(a)(2)(B), we refuse to read the IG Act to have impliedly repealed . . . section [7114(a)(2)(B)] of the [Statute]." Pet. App. 15a (citing *Morton*, 417 U.S. at 551).

2. Compliance with Section 7114(a)(2)(B) Does Not Unduly Restrain the Conduct of OIG Investigations

Petitioners argue that NASA-OIG's independence from agency management, established by the IG Act, prevents an OIG agent from being a "representative of the agency." In support of this assertion petitioners list (Pet. Br. 25-33) numerous examples of the OIG's independent statutory functions.[16] But petitioners fail to establish how the Authority's interpretation of this congressionally established rule threatens the OIG's ability to fulfill its independent obligations.

For example, without supporting authority, petitioners suggest that the duty to report to the Attorney General, and the confidentiality associated therewith, would be compromised by attendance of union representatives at OIG interviews. Petitioners do

---

[16] Among these examples, petitioners note the OIG's prohibition "from performing the policy and programmatic functions of agency management," focusing particularly on their inability to discipline employees. Pet. Br. 31-32. They contend that this inability to discipline a NASA-HQ or component employee renders *Weingarten* inapplicable. Pet. Br. 33. However, in the analogous case of Postal Inspectors, the D.C. Circuit and the NLRB have determined the *Weingarten* right to be triggered when information gathered by the investigator is routinely turned over to management for possible disciplinary action. *See USPS*, 969 F.2d at 1072; *Jenkins*, 241 NLRB at 142.

not explain how, in fact, the presence of the union representative would interfere with this reporting obligation, nor do they point to any across-the-board provision in the IG Act establishing this "confidentiality" duty. Further, compliance with section 7114(a)(2)(B) does not compromise any OIG duty to notify the Attorney General of suspected criminal violations. Pet. App. 46a. Instead, as the Authority noted in agreement with this Court's *Weingarten* determination, the presence of a union representative, who could clarify facts or offer other pertinent information, would assist an investigation. *Id.* Such assistance, in turn, could lead to more thorough reporting by the OIG.

Similarly, the presence of a union representative in an OIG interview provides no apparent obstacle to fulfillment of the congressional reporting requirements, nor have petitioners provided any such example. In addition, as the Authority observed, the IG Act's congressional reporting requirements actually should alleviate OIG concerns because the IG Act thus provides a forum through which OIGs may report *if* the presence of union representatives during the interview of bargaining unit employees poses significant problems for OIG investigators. Pet. App. 47a-48a n.25.

The OIG's claimed inability to perform its statutory function if a union representative is present during investigative interviews is further undermined by petitioners' acknowledgment (Pet. Br. 34) that an employee enjoys the right to the presence of an attorney during an OIG interrogation. This acknowledgment causes petitioners two significant problems. First, the right to counsel, like the federal *Weingarten* right, is grounded in statute: "[a] person compelled to appear in person before an agency or *representative thereof* is entitled to be accompanied, represented, and advised by counsel." 5 U.S.C. 555(b) (1994) (emphasis added); *see*

Pet. App. 14a (Eleventh Circuit recognized 5 U.S.C. 555(b) right to counsel). As a result, petitioners find themselves in the inconsistent position of conceding that OIGs are the "representative" of the agency for the purposes of 5 U.S.C. 555(b), but not for the purposes of 5 U.S.C. 7114(a)(2)(B).

Second, and as the Eleventh Circuit noted, it is not apparent "how the right of an employee to be represented by a union representative presents a significantly greater interference with OIG interviews than the existing right of an employee to be represented . . . by an attorney." Pet. App. 14a. In response, petitioners attempt to distinguish an attorney, based on the attorney's duty of loyalty to the client, from a union representative, who might choose to share information concerning the interview with other members of the bargaining unit. Petitioners thus assert that union representatives pose a greater threat to confidentiality. Pet. Br. 34. But petitioners' assertions are both unsupported and inaccurate. Petitioners fail to identify any ethical or legal restriction that would preclude an attorney from subsequently sharing with others the matters about which the attorney's client was questioned in the presence of the third party OIG investigator. As for union representatives, on the other hand, the Authority has interposed no objection to the negotiation of bargaining agreement proposals requiring confidentiality by bargaining unit employees and their representatives concerning information discussed during section 7114(a)(2)(B) interviews. *See American Fed'n of Gov't Employees, Fed. Prison Council 33 and U.S. Dep't of Justice, Fed. Bureau of Prisons*, 51 FLRA 1112, 1117-1118 (1996).[17]

---

[17] Moreover, the Authority has followed private sector precedent and ruled that on a showing of "'special circumstances,'" an agency

Finally, petitioners' own arguments contradict the OIG's supposed total independence from agency management. As explained in note 18 of their brief (Pet. Br. 31 n.18), OIGs rely upon agency management to threaten administrative discipline in order to compel an employee's attendance and testimony at an IG interrogation. Such cooperation and coordination between the agency and the OIG in the process of interrogating bargaining unit employees refutes both the agency's lack of involvement and the OIG's independence.

In sum, petitioners have not demonstrated how the obligation of OIG investigators to comply with section 7114(a)(2)(B) poses any realistic threat to the IG Act's requirements. Having failed to establish any direct inconsistency between the IG Act and the Statute, petitioners attack the manner in which the Authority has defined the role of the union representative and raise the specter of criminal and emergency situations. Neither of these efforts advances petitioners' cause.

a. The Authority's Interpretation of the Union Representative's Role

According to petitioners, the role of the union representative, as construed by the Authority, will "impose[] major restrictions on the OIG's freedom to investigate" (Pet. Br. 34) because the Authority has broadly expanded the role of the *Weingarten* representative. *Id.* at 35-36. However, as noted by the Eleventh Circuit, such doomsday predictions are belied by petitioners' failure to cite even one instance where

---

is entitled to "preclude a particular individual from serving as the union's designated representative." *Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 54 FLRA (No. 133) 1502, 1512 (1998) (citation omitted).

the active participation of a representative has interfered with an OIG investigation. Pet. App. 14a.

To be sure, the Authority has recognized that the purposes underlying section 7114(a)(2)(B)'s codification of the *Weingarten* right can only be achieved by allowing a union representative to take an active role in assisting an employee during an investigatory interview. *See United States Dep't of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 440 (1990). However, this right is not without limitations. In *Weingarten*, the Supreme Court established that the union representative's presence "need not transform the interview into an adversary contest." 420 U.S. at 263. At the same time, the Court recognized that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263. The Authority's case law is consistent with this theme. *See Federal Aviation Admin., New England Region, Burlington, Mass.*, 35 FLRA 645, 652 (1990) (*FAA*).

Contrary to petitioners' claims, the Authority has recognized limits on a union representative's participation in section 7114(a)(2)(B) examinations. *See, e.g., American Fed'n of Gov't Employees, Nat'l Immigration & Naturalization Serv. Council and U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 8 FLRA 347, 363-64 (1982) (a union representative does not have the right to make a recording of an investigatory interview), *rev'd on other grounds, United States Dep't of Justice, Immigration & Naturalization Serv.* v. *FLRA*, 709 F.2d 724 (D.C. Cir. 1983); *INS, N.Y. Dist.*, 46 FLRA at 1223 (agency need not postpone an investigatory interview until such time as preferred union officials are available to represent); *Federal*

Prison Sys., Fed. Correctional Inst., Petersburg, Va., 25 FLRA 210, 228 (1987) (a union representative may be rejected by management in order to preserve the integrity of the investigation).

Petitioners mischaracterize Authority precedent in support of their assertion that the right to union representation will unduly interfere with investigations. Pet. Br. 35. For example, petitioners claim that according to *DOJ, Twin Cities*, 46 FLRA at 1553-1555, 1565-1569, a union representative has the "right to halt the examination and to step outside the hearing of investigators." Pet. Br. 35. On the contrary, the ruling in that case was that "[t]here is no indication in the record that a brief conference between the Union representative and the employee outside the hearing of the investigator would have been unduly disruptive, would have interfered with the objective of the examination, or would have compromised the integrity of the investigation." 46 FLRA at 1569. In a subsequent decision, the Authority clarified that there is no *per se* right for an employee and a union representative to confer privately outside the interview room during a *Weingarten* examination. *See Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Ariz.*, 52 FLRA 421, 434 (1996).

As another example, petitioners overstate problems associated with the Authority's recognition of the right of the employee and union representative to consult prior to questioning, as established in *FAA*, 35 FLRA at 652-54. Contrary to petitioners' assertion, the consultation right advances the purposes of *Weingarten* as has been recognized by the D.C. Circuit and the NLRB in the Postal Inspector context. *See USPS*, 969 F.2d at 1072, *affirming United States Postal Serv. and American Postal Workers Union, East Bay Area Local*, 303 NLRB 463 (1991).

In asserting that the Authority's representation rights case law would allow union representatives to unduly interfere with OIG investigations, petitioners argue that union representatives "could do what the agency head cannot do—direct and limit how the Inspector General conducts an investigation."[18] Pet. Br. 35; *see* 5 U.S.C. App. 3 § 3(a) (agency head may not "prevent or prohibit" OIG investigations). As noted above, petitioners have yet to provide an example of union representation interfering in an OIG investigation. Indeed, it is difficult to envision how the presence of a union representative at an interview would "prevent or prohibit" an OIG investigation, 5 U.S.C. App. 3 § 3(a). How the presence of a union representative equates to the agency head's interference in an OIG investigation is likewise unclear.

Petitioners also raise objections to the OIG's status as "representative of the agency" based upon the OIG's supposed law enforcement authority, claiming that the Authority has conceded that law enforcement entities are exempt from the coverage of section 7114(a)(2)(B) (Pet. Br. 24, 42) and noting that OIGs may be involved with joint investigations with such law enforcement agencies. Neither of these arguments suggests that the Authority's rule, as developed to date, should be rejected. As a threshold matter, the only across-the-board law enforcement authority set forth in the IG Act is the responsibility in 5 U.S.C. App. 3 § 4(d), to report to the Attorney General violations of federal criminal law.[19]

---

[18] It should be noted that the IG Act limits only the agency head's ability to "prevent or prohibit" an OIG investigation (5 U.S.C. App. 3 § 3(a)), not the agency head's ability to work cooperatively with the OIG to ensure that fraud and abuse in the agency are eliminated and prevented. For example, nothing in the IG Act would preclude an agency head from suggesting that certain matters or employees be investigated.

In any event, and contrary to petitioners' assertion, the Authority has not conceded as a general matter that law enforcement entities are exempt from section 7114(a)(2)(B) coverage.[20] Rather, in the instant case, the Authority acknowledged that the FBI, for example, has statutory authority to "'investigate any violation of title 18 involving Government officers and employees—(1) *notwithstanding any other provision of law.*'" Pet. App. 43a n.23 (quoting 28 U.S.C. 535(a)). Moreover, the Authority also made clear that its decision "should not be construed as suggesting that [the Authority] would conclude in all circumstances that every employee of each subcomponent of agencies having government-wide, law-enforcement responsibilities, such as the Department of Justice, is a 'representative of the agency' for the purposes of section 7114(a)(2)(B)." *Id.* The Authority noted that such cases might well be distinguishable from the case at bar. *Id.*

---

[19] *See* Vicky L. Powell, *Why Isn't Law Enforcement Authority in the Inspector General Act?*, The Journal of Public Inquiry, Spring/Summer 1998, at 33.

[20] Nor have the NLRB and D.C. Circuit exempted law enforcement entities from *Weingarten* coverage. Postal Inspectors, for example, "serve . . . as federal law enforcement officers, with authority to carry weapons, make arrests, and enforce postal and other laws of the United States." *USPS*, 969 F.2d at 1066 (citing 18 U.S.C. 3061). Notwithstanding Postal Inspectors' status as federal law enforcement officers and their coverage under the IG Act, employees interrogated by Postal Inspectors have a right to union representation at such an investigation under *Weingarten*. *See Jenkins*, 241 NLRB at 142. The NLRB rejected USPS concerns that extending *Weingarten* provisions to investigations by Postal Inspectors would interfere with "legitimate employer prerogatives" and create public safety issues. *Id.; see also USPS*, 969 F.2d at 1072 ("[W]e uphold as reasonable the NLRB's judgment that neither 'public safety' nor 'legitimate employer prerogatives' necessitate the suggested exemption of Inspector interviews, and the attendant 'sacrifice' of the statutory right of postal employees.")

The Authority's above-referenced, self-imposed limitation on the breadth of its decision herein also addresses petitioners' concern about joint investigations. If, unlike the case at hand, an investigation were criminal, rather than administrative, and again unlike this case, conducted in coordination with a law enforcement agency, rather than solely by NASA-OIG, the Authority, and in turn a United States Court of Appeals, could determine whether the *Weingarten* right should apply. The fact that petitioners can envision circumstances involving OIGs where the *Weingarten* right might be inappropriate does not, however, lead to the conclusion that it should be denied in all instances involving OIGs. The Authority has pointedly signaled that there may be circumstances where the questioner is not a "representative of the agency." *Id.* Such specific determinations are better left to the administrative expertise of the Authority and case-by-case adjudication, especially given this Court's "practice of deciding only 'concrete legal issues, presented in actual cases.'" *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 65 n.11 (1989) (quoting *United Pub. Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947)).

Finally, petitioners reference the Authority's determination that parties may negotiate representation rights beyond those provided in section 7114(a)(2)(B). *See American Fed'n of State, County, & Mun. Employees, Local 3097 and United States Dep't of Justice, Justice Management Div.*, 42 FLRA 412, 435 (1991). Petitioners argue that this ruling subjects the representational rights to expansion. Although their point is correct, petitioners ignore the statutory recourse options that exist when they are dissatisfied with an Authority decision regarding OIG investigations. First, pursuant to 5 U.S.C. 7123, such

decisions are subject to judicial review and a court of appeals can disagree with the Authority's determinations. This option was pursued successfully by the agency in *NRC*. 25 F.3d 229. Second, and as noted earlier, because the IG Act requires an agency Inspector General to report semiannually to Congress on, among other things, "significant problems . . . relating to the administration of programs and operations," 5 U.S.C. App. 3 § 5(a)(1), an Inspector General could report any significant problems resulting from compliance with section 7114(a)(2)(B) directly to Congress.

Rather than support petitioners' assertions, precedent demonstrates that the Authority has adhered to the Court's teachings in *Weingarten* and carefully balanced the employer's right to interview its employees with the employee's right to be represented. Instead of pronouncing across-the-board rules for circumstances not before it, the Authority has wisely indicated that it will decide specific section 7114(a)(2)(B) scenarios based on the facts of the cases if, and as, they arise. Avenues are available to challenge Authority determinations that allegedly interfere with OIG statutory responsibilities.

b. Criminal Investigations and Emergency Situations

Petitioners argue that the Authority's ruling could improperly implicate the section 7114(a)(2)(B) right in a case involving criminal or emergency situations. Pet. Br. 37. Doubtless there will be investigations involving criminal activity, because virtually any workplace matter being investigated involves conduct that could be characterized as a crime. For example, an altercation between two employees could be criminal assault; missing property or inventory shortages could be larceny or embezzlement; or drug use in the workplace

could be possession of contraband. In fact, the employee interviewed in the *Weingarten* case was suspected of theft. 420 U.S. at 254-55. In any event, the "*Weingarten* protections have been consistently accorded to private sector employees suspected of criminal conduct." *USPS*, 969 F.2d at 1071-72; *see also Department of the Treasury, Internal Revenue Serv., Jacksonville Dist. and Dep't of the Treasury, Internal Revenue Serv., Southeast Reg'l Office of Inspection*, 23 FLRA 876 (1986).

With regard to petitioners' claim that the OIG will be hindered in emergency circumstances, it should be noted that the Authority has not considered the applicability of section 7114(a)(2)(B) in an emergency situation. As stated earlier, however, the Authority *has* determined that an agency is not obligated under the Statute to postpone an investigatory interview until a particular union representative is available. *See INS, N.Y.*, 46 FLRA at 1223. In addition, pursuant to section 7106(a)(2)(D), agencies have the statutory right to "take whatever actions may be necessary to carry out the agency mission during emergencies."

In sum, petitioners have failed to demonstrate that compliance with section 7114(a)(2)(B) will cause undue restraint on the OIG, particularly to any degree actually prohibited by the IG Act. As stated in *DCIS*, "[g]iven the limited function of a *Weingarten* representative, it is conceivable to us that Congress might conclude that the employee's interest in representation outweighs the limited interference that his or her representative's presence might occasion" in OIG interviews. 855 F.2d at 101.

II. NASA-HQ, in Addition to NASA-OIG, Is Properly Responsible for the ULP Committed by NASA-OIG

The Authority properly found that NASA-HQ violated section 7114(a)(2)(B) and, therefore, committed a ULP in violation of section 7116(a)(1) and (8) of the Statute. The Eleventh Circuit, deferring to the Authority, properly upheld this determination.

Contrary to petitioners' argument that the court below misconstrued the IG Act (Pet. Br. 46), the IG Act clearly states that NASA-OIG is "under the general supervision of the [agency] head." 5 U.S.C. App. 3 § 3(a). Although NASA-HQ may not prevent NASA-OIG from initiating, carrying out, or completing an audit or investigation, *id.*, the IG Act gives no indication that an agency head is prohibited from directing the OIG to comply with a federal statute.

As the Authority held in *DOD, DCIS*, it is appropriate for the agency headquarters with administrative responsibility for the OIG to advise Inspectors General "of the pertinent rights and obligations established by Congress in enacting the [Statute]. More particularly, . . . investigators should be advised that they may not engage in conduct which unlawfully interferes with the rights of employees under the Statute." 28 FLRA at 1151. Holding NASA-HQ responsible for NASA-OIG's violation of section 7114(a)(2)(B) fulfills the purposes of section 7114(a)(2)(B).

In this regard, the Authority has long held that "when a component of an agency engages in conduct which unlawfully interferes with the protected rights of employees of another component," as did NASA-OIG in this case, "a violation of section 7116(a)(1) of the Statute will be found to have occurred." *DLA*, 22 FLRA at

884.[21] This concept has also been applied to sanction a parent agency that did not have a collective bargaining relationship with the union, as with NASA-HQ, for violations of the Statute based upon actions involving a subcomponent's responsibilities under the Statute. *See DVA*, 48 FLRA at 1000-01; *Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Ill.*, 44 FLRA 117, 125 (1992), *review denied sub nom. Headquarters, U.S. Air Force, Washington, D.C.* v. *FLRA*, 10 F.3d 13 (D.C. Cir. 1993) (without opinion).

In affirming the Authority's determination, the Eleventh Circuit recognized that "[i]n conducting investigations within the agency, NASA-OIG serves the interest of NASA-HQ by soliciting information of possible misconduct committed by NASA employees." Pet. App. 19a. Particularly persuasive to the court as indicative of NASA-OIG's actions on behalf of NASA-HQ was "[t]he fact that the NASA-OIG agent in this case ordered the employee to answer questions or face dismissal." *Id.*[22] Accordingly, the court found "no clear error in the Authority's determination that NASA-HQ should be held responsible for the investigator's violation of [section] 7114(a)(2)(B)." *Id.* The Authority urges the Court to reach the same determination.

---

[21] As explained at note 9 *supra*, this concept had its genesis in the private sector.

[22] As noted earlier (see p.38 *supra*), petitioners acknowledge this cooperation between the agency and its OIG in compelling employees to participate in OIG investigations. Pet. Br. 31 n.18.

CONCLUSION

The judgment of the court of appeals should be affirmed.[23]

Respectfully submitted.

DAVID M. SMITH*
Solicitor

ANN M. BOEHM
Attorney

* Counsel of Record

JANUARY 1999

---

[23] The Solicitor General authorized the filing of this brief and directed the Authority to include the following statement:

I authorize the filing of this brief. Seth P. Waxman, Solicitor General.